

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

FILED
March 13, 1997
Cecil W. Crowson
Appellate Court Clerk

WALLACE WAYNE WILLINGHAM,)
)
Appellant,)
)
VS.)
)
STATE OF TENNESSEE,)
)
Appellee.)

C.C.A. NO. 01C01-9602-CC-00069
GILES COUNTY
HON. JIM T. HAMILTON,
JUDGE
(Habeas Corpus/Post-Conviction)

FOR THE APPELLANT:

FOR THE APPELLEE:

HERSHELL D. KOGER
135 N. First St.
P.O. Box 1148
Pulaski, TN 38478

CHARLES W. BURSON
Attorney General & Reporter

DARYL J. BRAND
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

MIKE BOTTOMS
District Attorney General

RICHARD H. DUNAVANT
Asst. District Attorney General
Giles County Courthouse
P.O. Box 304
Pulaski, TN 38478

OPINION FILED: _____

Affirmed

JOHN H. PEAY,
Judge

OPINION

The petitioner was indicted on seven charges including three Class C felonies and four Class A misdemeanors. On September 27, 1993, he pled guilty to two counts of selling cocaine, two counts of theft, one count of possession of drugs, and one count of possession of drug paraphernalia. He entered a nolo contendere plea to the remaining charge of attempted rape. In exchange for these pleas, the defendant was sentenced as a Range I standard offender despite his criminal record. He received a total sentence of three years. This sentence was to be served consecutively to an eight year sentence that the petitioner was already serving in the Department of Correction.

In December of 1994, the petitioner filed a pro se petition for writ of habeas corpus. Counsel was appointed for the petitioner and an amended petition was filed. In a November 1995 hearing, the trial court treated the petition as one for post-conviction relief and denied the petitioner any relief. He now appeals, alleging as grounds for relief that his plea of nolo contendere was not made knowingly, voluntarily, and intelligently and that he received ineffective assistance of counsel in conjunction with that plea. After reviewing the record, we find no merit to either of these grounds and affirm the court below.

With respect to his first issue, the petitioner alleges that he did not understand the nature and effect of a nolo contendere plea. At the hearing on the post-conviction petition, he testified that he had thought he was pleading not guilty. He further testified that he had not committed the attempted rape and, therefore, had not wanted to plead guilty to that charge. The petitioner does not complain that his guilty pleas to the other six charges were in any way tainted.

Robert D. Massey, the petitioner's court-appointed attorney when the pleas of guilty and nolo contendere were entered, also testified at the post-conviction hearing. Massey testified that the petitioner had not wanted to enter a plea on the attempted rape charge but that the State would only agree to a "package" sentence of three years if the agreement included the petitioner's plea to the attempted rape charge. He further testified that he had told the petitioner that if he did not accept the plea agreement and went to trial, he could receive a much lengthier sentence. The State had already filed notice of its intent to seek enhanced punishment for the petitioner based on his prior criminal record. Massey also testified that he had explained that, while the petitioner would never have to stand before a court and verbally admit guilt to the attempted rape, his plea of nolo contendere would have the same legal effect as a guilty plea.

The transcript of the petitioner's entry of pleas was made an exhibit at the post-conviction hearing. The transcript revealed that prior to the petitioner's pleas, the trial court judge informed the petitioner of his constitutional rights and then specifically asked him, "You understand that a plea of nolo contendere has the same effect as a plea of guilty does. Do you understand that?" The petitioner answered, "Yes, sir." The petitioner's signed plea of nolo contendere and pleas of guilt further reveal the petitioner's willingness to make the pleas.

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

As to whether the petitioner knowingly, voluntarily, and intelligently entered the plea of nolo contendere, the court below found that a “reading of that transcript will show that the Court explained to [the petitioner], and he indicated that he understood, time and time again, what he was doing that day when he entered this plea.” The court further noted, “[t]he transcript reveals nothing other than that the plea was entered knowingly and voluntarily.” Upon our review of the record, it is clear that the trial court and petitioner’s counsel fully advised the petitioner of his rights and the significance and ramifications of his nolo contendere plea. It is equally clear that the defendant listened to the trial court and understood what he was being told. As the evidence does not preponderate against the trial court’s findings, these findings will not be disturbed. State v. Kelly, 603 S.W.2d 726, 728-29 (Tenn. 1980). Accordingly, we find the petitioner’s first issue is without merit.

In his second issue, the petitioner complains that he received ineffective assistance of counsel in regard to the nolo contendere plea. He specifically complains that his defense counsel did not adequately investigate the facts and circumstances surrounding the attempted rape charge and that defense counsel failed to adequately explain the significance of entering the nolo contendere plea.

In reviewing the petitioner’s Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of ineffective counsel, a petitioner “must show that counsel’s representation fell below an objective standard of reasonableness” and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel’s error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668,

687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

To satisfy the requirement of prejudice, he would have had to demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. See Hill v. Lockart, 474 U.S. 52, 59 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

In his allegations of ineffective assistance, the petitioner first contends that his defense counsel failed to adequately investigate the attempted rape charge. He argues that an investigation would have revealed that the alleged victim would have testified that the petitioner did not attempt to rape her. However, the alleged victim in this case had given a statement to the police in August of 1992 alleging that the petitioner did force himself on her and did attempt to rape her. Some time after the petitioner pled nolo contendere to the charge, she recanted her story, and in a signed affidavit presented to the court during the post-conviction proceedings, she denied that the petitioner had tried to rape her.

While testifying at the post-conviction hearing, the alleged victim stated that the petitioner did not attempt to rape her and that she did not remember giving the August 1992 statement about the attempted rape. However, she acknowledged that the statement did contain her signature on both pages. The officer who took the statement also testified at the post-conviction hearing. She testified that she typed the alleged victim's statement exactly as the victim relayed it to her. She further testified that she did not suggest any of the facts to the alleged victim.

Mr. Massey testified that he had not attempted to talk to the alleged victim in this case and that he "probably didn't do as good a job investigating it as [he] should

have.” At the time he and the petitioner discussed accepting the State’s offer, Massey had seen the alleged victim’s statement and advised the petitioner that if they went to trial and the alleged victim’s testimony was consistent with her statement, the petitioner could be convicted and could serve a much longer sentence than the three year “package” sentence offered by the State.

At no time during the post-conviction hearing did the petitioner show that had Massey interviewed the alleged victim she would have recanted her previous statement to the police. Nor did the petitioner show that Massey’s failure to interview the alleged victim affected his decision to plead nolo contendere to the charge rather than go to trial. Thus, the petitioner has failed to show that he was prejudiced by the alleged inadequate investigation by his defense counsel. This issue is without merit.

The petitioner next alleges that his defense counsel failed to adequately explain the significance of pleading nolo contendere to the attempted rape charge. At his post-conviction hearing, the petitioner testified that he had thought the nolo contendere plea was the same as pleading not guilty. However, Massey testified that he had explained to the petitioner that while he would never actually have to say in court that he was guilty, his plea of nolo contendere would have the same legal effect as a guilty plea. Massey further testified that while neither he nor the petitioner had liked the fact that the petitioner would have to plead nolo contendere to the charge, it was the only way the State would agree to a total sentence of only three years. Massey testified that he had shown the petitioner the chart of sentencing ranges and explained that if he were convicted on his three Class C felonies and sentenced as a career offender, he could be sentenced to up to fifteen years on each felony and would have to serve sixty percent of his sentence. Massey testified that after this explanation, the petitioner had decided to enter a plea of nolo contendere in order to receive the State’s offer of a three year

sentence.

The trial court found that Massey had in fact explained the significance of the plea of nolo contendere and noted that the petitioner had received a “real deal” of three years when he could have been sentenced as a career offender. The evidence does not preponderate against these findings by the court below. This issue is also without merit.

The petitioner’s complaints that his plea of nolo contendere was not entered knowingly, voluntarily, and intelligently and that he received ineffective assistance of counsel are without merit. The ruling of the court below is affirmed.

JOHN H. PEAY, Judge

CONCUR:

DAVID H. WELLES, Judge

JERRY L. SMITH, Judge